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No. 15-214

SUPREME COURT, U.S.
FILED
OCT 16 2015
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In The

Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REMZY D. BITAR
Counsel of Record
CRIVELLO CARLSON, S.C.
710 North Plankinton Ave., Suite 500
Milwaukee, WI 53203
Telephone: (414) 271-7722
Facsimile: (414) 271-4438
E-mail: rbitar@crivellocarlson.com

Counsel for Respondent
St. Croix County

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In a regulatory takings action, should a court evaluate a claimant's property as a whole when that property is contiguous, has been held in common ownership for many years, and is unified in use?

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STATEMENT

Respondent, St. Croix County, respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioners, Joseph P. Murr, Michael W. Murr, Donna J. Murr and Peggy M. Heaver.

OPINIONS BELOW

The St. Croix County Circuit Court dismissed Petitioners' regulatory takings claim on summary judgment. In doing so, it ruled that the claim was time-barred under the applicable statute of limitation and that there was no regulatory taking as a matter of law. The court did not consider whether Petitioners' claim was ripe for adjudication. The court's decision is unreported and a copy of the opinion is included in Petitioners' Appendix at B-1

The Wisconsin Court of Appeals affirmed the circuit court's ruling on the basis that there was no regulatory taking as a matter of law. The court declined to rule on the statute of limitations issue and did not consider whether Petitioners' claim was ripe for adjudication. The court's decision is unpublished and its disposition is reported at 359 Wis. 2d 675, 2014 WL 7271581 (Dec. 23, 2014). A copy of the opinion is included in Petitioners' Appendix at A-1.

The Wisconsin Supreme Court issued an Order denying a Petition for Review on April 16, 2015. A

copy of the court's Order is included in Petitioners' Appendix at C-1.

JURISDICTION

The United States Supreme Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Fifth Amendment of the United States Constitution provides, in part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The ordinance at issue is St. Croix County Code of Ordinances, Land Use and Development, Subch. III. V, Lower St. Croix Riverway Overlay Dist. § 17.36 I.4.a. A copy of the relevant sections of this Ordinance is included in Petitioners' Appendix at D-1.

STATEMENT OF THE CASE AND FACTS

In the mid-1990s, Petitioners acquired from their parents beautiful riverfront property with a cabin located directly on the banks of the scenic St. Croix River. When Petitioners acquired the property, they knew that it was highly protected by federal, state, county and local (i.e., town) regulations intended to preserve the area's beauty and significance.

Ten years after Petitioners acquired the property, they drew-up a grandiose plan to redevelop the cabin as a riverfront residence, despite the fact that they knew the plan was disallowed under certain land-use regulations that have been in place since 1975.

Nevertheless, Petitioners submitted their plan to the St. Croix County Board for consideration. The Board denied their plan and refused to make an exception to the longstanding regulations. Instead of modifying the plan – or submitting a less-intrusive plan that complied with the existing regulations – Petitioners filed this lawsuit alleging a regulatory taking.

A. The Property at Issue.

Petitioners currently own property along the St. Croix River in St. Croix County, Wisconsin. The property is recorded as two separate lots on the St. Croix Cove subdivision plat – Lot E and Lot F.

B. Petitioners Placed Their Property in Common Ownership.

Petitioners' parents originally purchased Lot F in 1960 and transferred it to their plumbing business. Soon thereafter, they built a three-season cabin entirely within the confines of Lot F which is still used by Petitioners and their family to this day. The parents subsequently purchased adjacent Lot E in 1963. Lot E was vacant at the time and has always remained vacant.

The parents voluntarily conveyed title to Lot F and Lot E to Petitioners in 1994 and in 1995, respectively. They did so despite the fact that applicable transfer deeds and contracts clearly specified that the property was "subject to easements, covenants, restrictions and declarations of record."

Those transactions – which were voluntarily effectuated by Petitioners and their parents – placed Lots E and F in common ownership and triggered the land-use regulations discussed below. In other words, had Petitioners and their parents not placed the two lots in common ownership, the regulations at issue would be inapplicable. Contrary to what Petitioners suggest, it was their own acts, not the conduct of the County or State, which caused their property to be subjected to the applicable land-use regulations.

C. The Land-Use Regulations.

Petitioners' property is protected by a host of federal, state, county and local regulations.

Congress enacted the National Wild and Scenic Rivers Act (Act) in 1968 to preserve certain rivers for the enjoyment of present and future generations, to wit:

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dams and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.

Wild & Scenic Rivers Act, October 2, 1968.

The Act, which designates certain rivers as "wild, scenic, or recreational," safeguards the character of those rivers, recognizes the potential for their appropriate use, and encourages management and protection.

Designated rivers are protected by landowners and river users, and through governmental regulations and programs. Designation encourages recreation, agriculture and residential development. It does not prohibit development or give the government control over private property.

Congress designated a portion of the St. Croix River as a National Scenic Riverway as "wild, scenic, or recreational" under the Act. In response, the Wisconsin Legislature enacted Wisconsin Statute § 30.27(1), which recognizes the Lower St. Croix River as part of the national wild and scenic rivers system, and § 30.27(2), which requires the Department of Natural Resources (DNR) to "adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River."

In 1973, Wisconsin enacted § 30.27(3) which requires all affected municipalities to adopt ordinances at least as restrictive as those of the DNR and which forces the DNR and municipalities to adopt riverway zoning that complies with DNR standards. The DNR responded by adopting Administrative Code Chapter NR 118. Likewise, in 1975, St. Croix County enacted the Lower St. Croix Riverway Ordinance and revised it in 1977 to make it consistent with NR 118.

The Lower St. Croix Riverway Ordinance mirrors Wis. Admin. Code § NR 118.08(4) and provides as follows:

> **SUBSTANDARD LOTS**: Lots of record in the Register of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> The lot is in separate ownership from abutting lands, or [t]he lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. *Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.*
>
> All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

St. Croix County, WI, Code of Ordinances, Land Use & Development, Sub. III.V, Lower St. Croix Riverway Overlay Dist. § 17.36I.4.a. (July 1, 2007) (emphasis added); Wis. Admin. Code § NR 118.08(4).

This substandard lots provision is the subject of Petitioners' regulatory takings claim.

D. Petitioners' Development Plan and Variance Requests.

Petitioners' parents never attempted to develop the property before they conveyed it to their children. In fact, neither Petitioners nor their parents approached the State, County or Town in regard to developing the property until late 2004 or early 2005, when Petitioners sought to flood-proof the existing cabin after numerous flooding events. Around that time, Petitioners also began to consider selling the portion of the property recorded as Lot E and building a new residence outside of the existing cabin's footprint.

In August of 2005, Petitioners received a letter from St. Croix County's zoning department in response to their questions regarding the potential reconstruction and expansion of their cabin. The letter indicated that Petitioners were required to obtain special exception permits or variances in order to proceed with their desired plan.

Indeed, Petitioners have always needed variances to proceed with their desired plan because the substandard lots provision discussed above has always barred the same. Both lots have less than one acre of building space and are considered to be in the floodplain. Petitioners' plans involved, among other things, reconstructing the residence on a new footprint and raising the elevation of the cabin to remove it from the floodplain. As the lots exist today, they have a combined total of less than one acre of net

project area, the majority of which is above the bluff-line. Separate, each lot is approximately one acre in size with only one-half acre of net project area.

Because the substandard lots provision precludes this type of development, Petitioners requested the following variances from the County in 2006: (1) a variance to sell or use two contiguous substandard lots (Lots E and F) in common ownership as separate building sites; (2) a variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) a variance to fill, grade, and place a structure in the slope preservation zone; (4) a special exception to fill and grade within forty feet of the slope preservation zone; (5) a special exception to fill and grade over 2000 square feet; (6) a variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) a variance to reconstruct a patio within the ordinary high-water mark setback; and (8) a variance to construct a deck within the ordinary high-water mark setback. *See Murr v. St. Croix Cnty. Bd. of Adj.*, 2011 WI App. 29, ¶5, 796 N.W.2d 837.

The first variance request – to separately sell or use Lots E and F – is the subject of this lawsuit. The eight requests for variances and/or exceptions are the only requests that Petitioners have ever made. Petitioners have never submitted any other application to the County, Town, or State.

St. Croix County zoning staff and the DNR did not recommend approval of the plans. The zoning

staff did not recommend approval because numerous other options were available such that Petitioners did not meet the "hardship" exception necessary to obtain variance approvals.

One option was that a compliant building site existed on top of the bluff. The other option was that the existing cabin could be properly flood-proofed in the same location. Doing so would not require any filling, grading or tree removal and would protect the structure during any future flooding. The zoning staff did not believe that a hardship existed because Petitioners had a compliant building site on their property and could flood-proof their existing cabin. Additionally, because the existing cabin qualifies as a nonconforming structure, Petitioners could flood-proof the cabin and expand it up to 50% of its assessed value without obtaining a variance. Finally, the zoning staff also discovered that the instances of flooding were self-created because Petitioners built in a floodplain.

Similarly, the DNR believed that the hardship exception could not be met because a buildable area on top of the bluff existed on which Petitioners could build a new residence without obtaining variances or special exceptions. Although variances are the mechanism for landowners who have no other options, the DNR concluded that Petitioners *did, in fact*, have choices which negated their need for variances. The DNR also expressed several concerns with lot reconfiguration, demolition of the existing structure, floodplain fill and construction of new residential

structures. In addition, it noted that improvements of up to 50% of the current fair market value of the existing residence are allowed in floodplain zoning. Finally, riverway zoning also allows for improvements to existing structures. Petitioners chose not to pursue any of these available options.

E. Appeal of the Variance Denials.

The St. Croix County Board of Adjustment (hereinafter, "Board") conducted a hearing in June of 2006 and denied all of Petitioners' variance requests. Its decision triggered subsequent appeals and this lawsuit.

The St. Croix County Circuit Court affirmed the Board's denial of the variance to separately sell or use Lot E on certiorari review. Petitioners appealed that decision to the Wisconsin Court of Appeals.

The Wisconsin Court of Appeals affirmed the Board's denial of the variance in a published opinion, *Murr v. St. Croix Cnty. Bd. of Adj.*, 2011 WI App. 29, 332 Wis. 2d 172, 796 N.W.2d 837. In doing so, it recognized that the Lower St. Croix Riverway Ordinance "applied to all abutting properties that existed on the specified date, regardless of when they came under common ownership" and explained that

> When the provisions became effective, every person who already owned a lot could still build. If the lot was too small under the new rule, that was acceptable; owners could still build on their lot or sell it as a developable

> lot. However, if the substandard lot owner owned an adjacent lot as well, then the lots were effectively merged and the owner could only sell or build on the single larger lot. This result preserved both property values and the environment.

Id., ¶ 14.

The Wisconsin Court of Appeals also held that the application of the substandard lots provision did not deprive Petitioners of any property rights. *Id.*, ¶ 16. It explained that because "the provisions [were] already effective prior to subsequent owners' acquisition of their lots, there is no concern that the provisions would deprive those persons of their property. Any effect on property values has already been realized." *Id.*

Finally, the court noted that:

> [B]ecause Murr is charged with knowledge of the existing zoning laws, as a subsequent owner she was already in a better position than any person who owned at the provisions' effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, the parcel would forever remain a distinct saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot.

Id., ¶¶ 17-18 (internal citations omitted).

F. Development Options and Use of Petitioners' Property.

Petitioners can develop and use their property despite the denial of the variance. In fact, Petitioners have always retained the following development options which they refuse to pursue:

First, Petitioners could build a sizable, year-round residence on the level area located at the top of bluff. Their current cabin is not winterized and has only been used as a three-season cabin. In addition, it can only be accessed via Cove Court, a private road located on a 30' easement owned by the Winford Land Owners Association. Because of its steep grade, Cove Court is posted: "Steep hill no winter traffic." Hence, in the winter, Petitioners' current cabin is accessible only by foot, snowmobile or ATV.

In contrast, the level area on top of the bluff has frontage on Cove Road, a paved town road. Petitioners could construct a year-round residence on that area – like the hundreds of other families who own property along the St Croix River. *The residence could be built entirely on Lot E, entirely on Lot F, or it could straddle both lots.* Petitioners have chosen not to pursue this option because of their "desire to be on the water."

Second, Petitioners could reconstruct and flood-proof the existing cabin in the same footprint. They have chosen not to pursue this option because "it would require [them] to walk up a full flight of stairs to enter the main living area" of their cabin.

Third, Petitioners could raise the existing cabin on fill or pylons. They have chosen not to pursue this option because they are concerned with the cabin's "curb appeal" or "beach appeal," in that they would own the only cabin "that looks like that on the river, so it would actually, we felt, would make it look undesirable." The cabin "would look, in [their] opinion, like something you'd see on the Carolina coast versus the St. Croix River. We felt that we could do a better job of making it look good from the river by moving it back and putting it on fill."

Petitioners also retain recreational and residential uses of their property despite the denial of the variance. Petitioners have indicated that they regularly vacation at the property during the summer months, and that they consider the property "a family gathering place" that "keep[s] the family together" and provides private enjoyment for "19 nieces and nephews that can come and go freely." It is a place where Petitioners "spend quality family time," and go swimming without "worry[ing] about boat traffic and unsafe conditions."

The denial of the variance does not prevent Petitioners from using or enjoying their property. They can continue to play volleyball, park their vehicles, safely swim and engage in other recreational activities on the property. Moreover, they can continue to enjoy the heightened level of privacy associated with their ownership of the property.

G. Market Value of Petitioners' Property.

The market value of Petitioners' property has not been significantly impacted by the denial of the variance. Scott Williams, a licensed property appraiser, inspected and appraised the property on November 20, 2012. His appraisal was based on the property as it existed in June 2006.

Scott Williams first appraised Petitioners' property as a single 2.5-acre parcel, and then as two separate 1.25-acre parcels. As one parcel, the property has a market value of $698,000. As two parcels, it is valued at approximately $771,000. The difference in value between Petitioners' property as one lot, as opposed to two, is $72,800 – less than ten percent.

REASONS FOR DENYING THE WRIT (ARGUMENT)

I. CONSIDERATIONS GOVERNING CERTI

in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) *a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals*; or

(c) *a state court* or a United States court of appeals *has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

Sup. Ct. R. 10 (emphasis added).

II. THE PETITION SHOULD BE DENIED

It is well-settled that a claimant alleging a regulatory taking of his or her property is required to demonstrate a significant loss in value with respect to the "parcel as a whole." *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). The Supreme Court first articulated the "parcel as a whole" rule in *Penn Cent. Transp. Co.*, where it explained that:

> Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether the rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effectuated a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .

Id.

The Supreme Court confirmed this rule in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 498 (1987), where coal operators asserted that a court should only consider the coal that

Six years later, the Supreme Court again endorsed the "parcel as a whole" rule in *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). There, Concrete Pipe claimed that a regulatory taking occurred when federal law required it to pay "withdrawal liability" to a pension trust. *Id.* at 605. Concrete Pipe argued that a court should only consider the required payment to determine whether a compensable taking occurred. *Id.* at 643. The Supreme Court rejected that argument and reiterated the need to evaluate the economic impact on the entire property, not just the regulated portion:

> [A] claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

Id. at 644 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 130-31).

Subsequently, in 1997, Justice Scalia authored a concurring opinion in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 749 (1997) in which he expressed support for the "parcel as a whole" rule

subject to the regulation (or at least the contiguous parcels); and the use of the land, as a whole, had not been diminished." *Id.*

Finally, in 2002, the Supreme Court solidified its acceptance of the "parcel as a whole" rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). There, it held that a regional planning agency's temporary moratorium on development did not impose a categorical taking because the properties in question retained potential future use. *Id.* at 332. The Supreme Court based its holding on the "parcel as a whole" rule and explained that "[b]oth dimensions of a real property interest – the metes and bounds describing its geographical dimensions and the terms of years describing its temporal aspect – must be considered in viewing the interest in its entirety." *Id.* at 303. It explained that:

> Neither *Lucas*, nor *First English*, nor any of our other regulatory takings cases compels us to accept petitioners' categorical submission. In fact, these cases make clear that the categorical rule in *Lucas* was carved out for the 'extraordinary case' . . . *the default rule remains that, in the regulatory takings context, we require a more fact specific inquiry.*

Id. at 332 (emphasis added).

Here, Petitioners claim that review is warranted because the Supreme Court has not provided a categorical rule to define the relevant property, or to

determine what the "parcel as a whole" consists of, in a case precisely like the one at hand which "involves land, traditional parcels, and common residential lots." (Petition, p. 15.) While this may be true, the Supreme Court has also unmistakably explained that good reason exists for refusing to establish such specific and bright-line rules in regulatory takings cases.

Concepts of fairness and justice – which form the basis of the takings clause – are best served by eschewing any set formulas for determining when compensation is due. *See Penn Cent. Transp. Co.*, 438 U.S. at 124 ("we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'"). The Supreme Court has repeatedly emphasized that regulatory takings law is "characterized by an essentially ad hoc, factual inquiry . . . designed to allow careful examination and weighing of all the relevant circumstances." *See Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). It has instructed courts to weigh all relevant circumstances in context to determine whether a compensable regulatory taking has occurred. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) ("we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially, ad hoc, factual inquiries'"); *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 342

("we still resist the temptation to adopt *per se* rules . . . preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula").

The Supreme Court has explained that, in the regulatory takings context, an ad hoc approach is proper for determining whether compensation is due. This includes the determination of the relevant property, or the determination of precisely what the "parcel as a whole" consists of. Review is therefore not warranted on this basis.

III. THE PETITION SHOULD BE DENIED BECAUSE A SUBSTANTIAL CONFLICT DOES NOT EXIST AMONG THE LOWER COURTS.

Petitioners claim that "state and federal courts are in substantial conflict" with respect to the issue at hand and cite numerous cases in an attempt to derive support for their proposition. Those cases – as well as the examples provided below – all involve different facts and circumstances. They confirm that a flexible, ad hoc, approach has consistently been used by the lower courts to define the relevant property and to determine whether compensation is due.

Perhaps the most influential factors that lower courts consider are whether the property is contiguous and held in common ownership. *See, e.g.*, *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 377, 548 N.W.2d 528 (1996) (analyzing the property as a whole, as *Penn Central*, *Keystone*, and other persuasive authorities

"do not support the proposition that a contiguous property should be divided into discrete segments for purposes of evaluating a takings claim."); *Giovanella v. Conservation Com'n of Ashland*, 447 Mass. 720, 729, 857 N.E.2d 451 (2006) ("[T]he extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel. Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property."); *Daniels v. Area Plan Commission of Allen Cnty.*, 306 F.3d 445 (7th Cir. 2002) (common ownership of lots afforded beneficial presumption of a contiguous whole); *East Cape May Ass. v. New Jersey*, 693 A.2d 114, 125 (N.J. Super. Ct. App. Div. 1997) ("The majority of out-of-state cases which have considered the composition of the denominator of the taking fraction have held that it consists of all of the claimant's contiguous acreage in the same ownership.").

Lower courts also consider a claimant's actual use and treatment of the property. *See, e.g.*, *Forest Prop., Inc. v. U.S.*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (evaluating the property as a whole despite the fact that the property was recorded as separate lots because "the economic reality of the arrangements . . . transcended these legalistic bright lines."); *Giovanella*, 447 Mass. at 730 ("we consider an owner's intended use to be an important factor when deciding whether property should be protected as a distinct unit under the takings clause."); *Norman v. U.S.*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (including

property because "appellants themselves regarded the 2,280 acre parcel as a single economic unit"); *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (severing conservation land from land intended for residential development); *Appolo Fuels, Inc. v. U.S.*, 381 F.3d 1338, 1346 (Fed. Cir. 2004) (combining contiguous leases even though purchased at different times because they were part of "one unified mining plan"); *K & K Constr., Inc. v. Dept. of Natural Res.*, 456 Mich. 570, 582, 575 N.W.2d 531 (1998) (combining lots, in part, because owners "forged a connection between parcels . . . through the proposed development scheme and permit applications").

A claimant's prior knowledge of existing regulations has also been considered. *See, e.g., U.S. v. Ciampitti*, 22 Fed. Cl. 310 (1991) (the court dismissed the regulatory takings claim and, in its relevant parcel analysis, was influenced by the actual and constructive notice of the applicable regulations prior to the purchase); *Walcek v. United States*, 303 F.3d 1349 (Fed. Cir. 2002) (considering the fact that claimant failed to conduct proper due diligence prior to purchasing property which would have revealed existing regulations).

Finally, a flexible, ad hoc, approach has allowed lower courts to consider countless other factors, such as: (1) whether an artificial or natural structure divides the property, *see Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000) (describing property on either side of a road as physically remote); *Coeur D'Alene v. Simpson*, 142 Idaho 839, 136

P.3d 310 (2006) (presence of a road not determinative, but "one factor to consider"); (2) when the property was acquired, *see FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, Inc.*, 41 Mass. App. Ct. 681, 673 N.E.2d 61 (1996) (treating as one unit all lots purchased within same subdivision on same date); *Ciampitti*, 22 Fed. Cl. at 318-19 (finding noncontiguous lots acquired on same date to be one parcel); (3) whether the purchase or financing of the lots were linked, *see Forest Prop., Inc.*, 177 F.3d 1360 (treating two lots as one unit, in part, because option to purchase lake-bottom land could be exercised only by owner of adjacent property); *Ciampitti*, 583 F. Supp. at 319 (treating two noncontiguous lots as one parcel, in part, because the lots were "inextricably linked in terms of purchase and financing"); and (4) how the property is regarded under state law, *see Lucas*, 505 U.S. at 1016 n.7 (proposing solution to denominator problem according to "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land").

The cases cited in the Petition – as well as the examples provided above – reveal that a flexible, ad hoc, approach has consistently been used to define the relevant property and to determine whether compensation is due. State and federal courts are not in "substantial conflict" with respect to the same. Consequently, review is also not warranted on this basis.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE WISCONSIN COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH DECISIONS FROM OTHER COURTS.

The Wisconsin Court of Appeals also utilized a flexible approach and considered the specific circumstances surrounding Petitioners' claim to define the relevant property and to determine whether compensation is due. Its decision is therefore not in conflict with those from other state courts or federal courts.

As in many other cases, the Court of Appeals considered the fact that Petitioners' property was contiguous and commonly owned, and found those factors to be extremely influential. It noted that "[t]here is no dispute that the Murrs own contiguous property" and then explained that "[r]egardless of how that property is subdivided, contiguousness is the key fact. . . ." (Ct. App. Dec., ¶ 19.) As in many other cases, the Court of Appeals acknowledged the fact that Petitioners were aware of the applicable regulations when they took common ownership of Lots E and F. It explained that Petitioners "knew or should have known that their lots 'were heavily regulated from the get-go'" and reiterated that "this is precisely why we concluded in the Murrs' earlier appeal that any diminution in their property's value occurred at the time they took title to both contiguous lots." (Ct. App. Dec., ¶ 29.) Finally, as in many other cases, the Court of Appeals evaluated how Petitioners actually used and treated the property. It noted that

Petitioners "presumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger under the Ordinance," and conclude that "even if the[y] intended to separately develop or sell Lot E, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994." (Ct. App. Dec., ¶ 30.)

Petitioners correctly note that "as originally created, each parcel [Lots E and F] was a separate and distinct legal lot." (Petition, p. 3.) However, this fact is certainly not outcome dispositive and is insufficient to justify review. Indeed, the Supreme Court has explained that takings jurisprudence precludes reliance on "legalistic distinctions within a bundle of property rights." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 500. Lower courts have routinely recognized the same. *See, e.g.*, *Broadwater Farms Joint Venture v. U.S.*, 35 Fed. Cl. 232, 239-40 (1996) (holding that the relevant parcel includes all of claimant's contiguous property even though it was subdivided prior to the purchase); *K & K Constr., Inc.*, 456 Mich. at 580 (contiguous lots under the same ownership are to be considered as a whole . . . despite the owner's division of the property into separate, identifiable lots."); *District Intown Properties Lt. Part. v. Dist. of Columbia*, 198 F.3d 874, 883 (D.C. Cir. 1999) (relevant parcel included the entire property because it was contiguous and held in common ownership, and because the claimants treated it as an integrated

whole. Legal distinctions and tax treatment of the lots were not dispositive factors.).

Because the Court of Appeals considered the specific circumstances surrounding Petitioners' claim to define the relevant property and to determine whether compensation is due, its decision is in-line with those from other courts. Consequently, review is also not warranted on this basis.

V. THE PETITION SHOULD BE DENIED BECAUSE THE FACTS AND CIRCUMSTANCES PRESENTED IN THIS CASE MAKE IT A POOR VEHICLE FOR REVIEW, INCLUDING BECAUSE THE CLAIM IS UNRIPE, BARRED BY THE STATUTE OF LIMITATIONS, AND DOES NOT PRESENT A VIABLE REGULATORY TAKINGS AS A MATTER OF LAW.

Contrary to Petitioners' argument, this case does not present a straightforward or recurrent factual pattern. It involves case-specific facts that must be carefully evaluated and weighed in order to determine whether a regulatory taking occurred. Any ruling with respect to the "parcel as a whole" issue would be case-specific and inapplicable to other regulatory takings cases that present their own set of unique facts and circumstances. Indeed, the Supreme Court has already indicated that categorical rules are inappropriate in cases such as the one at hand. *See Penn Cent. Transp. Co.*, 438 U.S. at 124 ("Indeed, we have frequently observed that whether a particular

restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'"); *Lucas*, 505 U.S. at 1015 ("we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially, ad hoc, factual inquiries'"); *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 342 ("[W]e still resist the temptation to adopt *per se* rules . . . preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula").

In addition, any ruling with respect to the "parcel as a whole" issue would not impact the ultimate disposition of this case. Petitioners' regulatory takings claim will nevertheless be dismissed for the following reasons.

First, Petitioners cannot demonstrate that Lot E – even on its own – has been rendered practically useless or valueless. Petitioners confuse the ability to develop Lot E as a second, *separate lot* with the ability to develop or use Lot E *at all*. Petitioners are correct that they cannot separately develop Lot E as a standalone property in light of the Lower St. Croix Riverway Ordinance; however, it does not follow that they cannot develop or use any part of Lot E at all.

The question in this case is whether Petitioners can develop or use Lot E at all. The record reveals that Lot E can be used in all of the same ways as Lot F. It is undisputed that Petitioners can build a new

residence on top of the bluff that is *entirely located on Lot E*, entirely located on Lot F, or that straddles both lots. While Petitioners may have chosen not to pursue any other development options because they prefer to keep their cabin by the river, those options are nevertheless available.

Nor can Petitioners establish that Lot E has been rendered valueless. Respondent's expert, Scott Williams, appraised the entire property as a whole as of June 28, 2006, the date of the alleged taking. He determined that "as one lot [it] has a market value of $698,000, while as two lots, the collective value is approximately $771,000, which is less than a ten percent difference." As a matter of law, a ten percent loss in property value does not constitute a compensable regulatory taking. Unlike Scott Williams, Petitioners' appraiser, Timothy Williamson, did not appraise the 2006 value of the property as a whole.[1] Instead, he limited his appraisal to include only Lot E. In addition, to the extent that assessed values are relevant, tax assessor Roger Koski also failed to appraise or assess the property as a whole as of 2006. Their opinions were therefore improper.

Second, the regulatory takings claim is time-barred under the applicable statute of limitations.

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[1] June 28, 2006 is the date that the Board of Adjustment issued its decision denying the request for the variance. Both parties' appraisers used this date as the date of evaluation for their appraisals; however, only Williams appraised the land in both Lots E and F.

Although the Court of Appeals declined to rule on this issue, the circuit court property held that Petitioners' claim was precluded by the six-year statute of limitations which accrued when the injury was discovered, or with reasonable diligence should have been discovered.

In Wisconsin, a six-year statute of limitations applies to a claim for inverse condemnation. Wis. Stat. § 893.93(1)(a); *Pool v. City of Sheboygan*, 2007 WI 38, ¶ 21, 300 Wis. 2d 74, 729 N.W.2d 415. The cause of action accrues on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first. *Hansen v. A.H. Robins, Inc.* 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983). Wisconsin courts have explained that reasonable diligence "means such diligence as the majority of persons would use in the same or similar circumstances." *Spitler v. Dean*, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989).

The statute of limitations in this case accrued in 1975, when the Lower St. Croix Riverway Ordinance was passed and had an economic impact on Petitioners' property. In the alternative, it accrued when Petitioners acquired the property in 1995. At that time, they knew (or should have known through due diligence) that the Lower St. Croix Riverway Ordinance applied to their property and impacted their ability to separately sell and develop Lot E. At the very latest, Petitioners obtained actual knowledge on April 12, 2005, when their attorney sent them an email advising them to seek guidance from the County

Attorney "as to the applicability of the county's ordinance relative to the Murr property."

Because Petitioners filed the lawsuit on March 15, 2012, their regulatory takings claim was time-barred by the six-year statute of limitations regardless of whether it accrued in 1975, 1995 or 2005.

Third, the regulatory takings claim is unripe for adjudication because Petitioners did not exhaust available state and administrative remedies before filing this lawsuit. Other than the grandiose plan seeking an excessive amount of variances, Petitioners have never submitted any meaningful or less-intrusive development proposals with respect to their property as a whole. Nor have they exhausted available remedies with respect to Lot E. The Supreme Court should not accept the Petition on an academic issue involving the "parcel as a whole" rule when Petitioners have not even ripened their claim.

A court cannot adjudicate a land-use decision unless the property owner has exhausted all available state and administrative remedies. *Williamson Cnty. Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-94 (1985). The Supreme Court explained the exhaustion requirement in dismissing a land-use claim in *MacDonald v. Yolo Cnty.*, 477 U.S. 340 (1986). There, the Court explained that a claim cannot be adjudicated if "less-intrusive" proposals or plans regarding the sought-after development have not been submitted or pursued. *Id.* It noted that "[a] court

cannot determine whether a regulation has gone too far unless it knows how far a regulation goes." *Id.*

Like in *MacDonald*, Petitioners have never submitted any less-intrusive plans or proposals regarding development on the property as a whole. On the contrary, they only submitted their ideal proposal for review, which involved a grandiose plan to build on the river that required numerous variances. Petitioners have never submitted an application to build a residence on top of the bluff. Nor have they applied to raise the existing cabin because they are concerned with the "curb appeal" and "beach appeal." Finally, Petitioners have never requested any variances to flood-proof on fill in the existing cabin's footprint. Because Petitioners have options available, they cannot maintain their regulatory takings claim until they pursue one or more of those options. Or, at a minimum, submit a less intrusive proposal (as compared to their grandiose development plan).

CONCLUSION

For all of these reasons, the Supreme Court should deny the Petition for Writ of Certiorari.

Dated this 16th of October, 2015.

Respectfully Submitted,

REMZY D. BITAR
Counsel of Record
CRIVELLO CARLSON, S.C.
710 North Plankinton Ave., Suite 500
Milwaukee, WI 53203
Telephone: (414) 271-7722
Facsimile: (414) 271-4438
E-mail: rbitar@crivellocarlson.com

Counsel for Respondent
St. Croix County